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FILED
JUL 23 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 382

UNITED STATES OF AMERICA,

Respondent,

against

ROBERT HAMMOND and ROBERT LEWIS,

Defendants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
PETITION	1
CITATION TO OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	3
STATEMENT	4
BASIS OF JURISDICTION OF FEDERAL COURTS	4
REASONS FOR GRANTING THE WRIT	4
1. The decision of the Second Circuit is a direct conflict with the decision of the District of Columbia Circuit with regard to the first question presented by these petitioners	4
2. The decision of the Second Circuit conflicts with prior decisions of this Court	7
3. The Court of Appeals has decided a question of Federal law which should be settled by this Court	9
CONCLUSION	10
APPENDIX A: Original Opinion of United States Court of Appeals for the Second Circuit	A1
APPENDIX B: Judgment of United States Court of Appeals for the Second Circuit	A3

PAGE

APPENDIX C: Order of United States Court of Appeals for the Second Circuit Extending Time to File Petition for Rehearing A4

APPENDIX D: Order of United States Court of Appeals for the Second Circuit Denying Petition for Rehearing and Staying Mandate A5

APPENDIX E: Opinion of United States Court of Appeals for the Second Circuit Denying Petition for Rehearing *En Banc* A6

APPENDIX F: Opinion of United States Court of Appeals for the Second Circuit Denying Petition for Rehearing A7

TABLE OF AUTHORITIES

Cases:

Brady v. The State of Maryland, 373 U. S. 83 ..... 8, 9

Cannady v. United States, 315 F. 2d 318 5

Ross v. United States, 349 F. 2d 210 4

Roviaro v. United States, 353 U. S. 53 ..... 7, 8

United States v. Godfrey, 358 F. 2d 850 5

United States v. Jackson, 351 F. 2d 321 6

Statutes:

United States Constitution
Amendment V 3, 4

Title 21, Section 173 ..... 3, 4

IN THE

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October Term, 1966

No. .....

UNITED STATES OF AMERICA,

Respondent,

against

ROBERT HAMMOND and ROBERT LEWIS,

Defendants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

ROBERT HAMMOND and ROBERT LEWIS respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled action on June 27, 1966.

Citation to Opinions Below

The judgment of the United States District Court for the Second District of New York was rendered after a trial by jury on May 21, 1965. The original opinion of the United States Court of Appeals is unreported at the present time and is printed herein as Appendix A, page A1. The judgment of the United States Court of Appeals for the Second Circuit is unreported and is printed herein as Appendix B, page A3. The order of the United States Court of Appeals for the Second Circuit extending time to file petition for rehearing is unreported and is printed herein as Appendix C, page A4. The order of the United States Court of Appeals for the Second Circuit denying petition for rehearing and staying mandate is unreported and is printed herein as Appendix D, page A5. The order of the United States Court of Appeals for the Second Circuit denying petition for rehearing *en banc* is unreported and is printed herein as Appendix E, page A6. The opinion of the United States Court of Appeals for the Second Circuit denying petition for rehearing is unreported and is printed herein as Appendix F, page A7.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 27, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

1. Whether the delay between the time of the commission of the alleged crime and the time of the arrest, namely 15 months, was so prejudicial to the defendants as to deprive them of a fair trial in violation of due process of law.

2. Whether the Government should have properly produced the Government informer who allegedly was a major participant in the crimes charged against the defendants.

3. Whether the trial court committed serious error in

(a) its charge to the jury,

(b) its refusal to allow the defendants to examine their statements given to the Assistant U. S. Attorney subsequent to their arrest.

Statutes Involved

UNITED STATES CONSTITUTION

Amendment V:

"No person shall be held to answer for a capital or otherwise infamous crime unless presentment of indictment of a grand jury * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *."

TITLE 21 SECTION 173 U.S.C.

"It is unlawful to import or bring any narcotic drug into the United States * * *; except that such amounts of crude opium and cocaine leaves as the Commissioner of Narcotics finds to be necessary * * *."

Statement

The defendants, Robert Hammond and Robert Lewis, were convicted of violation of the Federal Narcotics Law, Title 21USC, Sections 173 and 174, after a trial before the Honorable Richard H. Levet and a jury. Hammond was sentenced to a term of 5 years imprisonment and Lewis to two terms of 5 years imprisonment, said terms to run concurrently. Bail was fixed in the sum of $7,500.00 for each defendant and they are both presently out on bail.

Basis of Jurisdiction of Federal Courts

The basis of jurisdiction of the United States District Court for the Southern District of New York is Title 21 Section 173 of United States Code.

Reasons for Granting the Writ

1. The decision of the Second Circuit is a direct conflict with the decision of the District of Columbia Circuit with regard to the first question presented by these petitioners.

In the instant case, there was a 15-month time period between the time of the alleged commission of the crime and the subsequent arrest therefor. The United States Court of Appeals for the District of Columbia held in *Ross* v. *United States,* 349 F. 2d 210, that a conviction for a violation of the narcotics laws would be reversed, because of a denial of due process of law under the Fifth Amendment of the United States Constitution, where the defendant was

unable to defend himself properly, due to the fact that the complaint against him was not sworn out until 7 months after the alleged commission of the crime. The Government's case consisted solely of the testimony of a police officer who allegedly had purchased the narcotics from the defendant. In that case, the defendant was unable to recall what had transpired on the day he was charged with the sale of the narcotics to the Government agent.

In the case at bar, the defendant Robert Hammond testified (11a, 12a)* that he could not recall where he was on the day of the alleged sale. He had no recollection of the events that transpired on that day. He was unable to give any account whatsoever of his activities at the time and place of the alleged commission of the crime for which he was indicted.

In *Cannady* v. *United States,* 315 F. 2d 318, the United States Court of Appeals held in a similar case that it must be recognized that the delay between the time of the alleged commission of the crime and the time of the arrest, when the accused is first informed of the charges against him, may blur his memory; that were he innocent, he would be unable to recall the facts or alibis for his defense. It must also be recognized that the risk of an erroneous conviction under these circumstances is compounded when the Government's case consists solely of the testimony of a narcotics agent who allegedly bought the narcotics from the accused.

In the *United States* v. *Godfrey,* 358 F. 2d 850, the court held that the 2-month delay between the alleged

* Numbers in parentheses, followed by the letter "a", refer to pages of the Appellants' Appendix.

offense and the obtaining of the arrest warrant and another 2-month delay between issuance of the arrest warrant and defendant's arrest was unreasonable and prejudicial to the defendant's ability to recall and reconstruct his whereabouts at the time of the alleged commission of the crime, and accordingly the delay diminished the defendant's capacity to defend himself.

In *United States* v. *Jackson,* 351 F. 2d 321, the court held that the delay may be so great that prejudice can be presumed unless the Government can show otherwise. The facts in the case at bar are quite similar to the facts in *Ross* v. *United States, supra.* In that case, the defendant was charged with a sale of narcotics to an undercover special agent. The prosecution's case rested solely upon the testimony of the agent, who had no independent recollection of the events that transpired on the day of the alleged sale. He of necessity had to refresh his memory from his notebook and from whatever notes and memoranda he made of the events that transpired on that day. The defendant unfortunately had no notes or memoranda. He could not remember the events of the day in question, nor could he give an accurate account of his activities on that day. The court held in no uncertain terms that the conviction must be reversed on the grounds of denial of due process, because the defendant was unable to properly defend himself. In the case at bar, we have a similar circumstance. The Government's case rests solely upon the testimony of the agent who allegedly made the buy and the surveilling agent who arrested the defendants some 15 months after the offense took place. The defendant unfortunately could not give a proper account of where he was

or what he was doing at the time and place that he is charged with selling the narcotics to the Government agent, and therefore deprived of a fair trial.

2. The decision of the Second Circuit conflicts with prior decisions of this Court.

The defendants were prejudiced by virtue of the fact that the Government failed to produce the informer who allegedly introduced the agent to the defendants for the purpose of buying narcotics.

In *Roviaro* v. *United States,* 353 U. S. 53, the United States Supreme Court held that the identity of the undercover employee may be so vital to the defendant's case that his non-disclosure will prevent the defendant from receiving a fair trial. In that case, the Government prosecuted the defendant for the illegal transportation of narcotics and the Government withheld the identity of its undercover employee; which constituted prejudicial error, especially where such undercover employee was under the Government's control and was instrumental in bringing about the sale of the narcotics in question. He was the only witness in a position to contradict the testimony of the Government's witnesses. The Supreme Court went on to further state that the identity of the informer must be disclosed when the informer's testimony would be important, and helpful to the accused. The testimony of the Government's informer would have been vital in that it would have corroborated the testimony of the Government's agent as to facts and circumstances regarding the alleged sale of the narcotics in question. In the case at bar, the Government contended that both defendants after being

introduced to the special agent by the Government informer, sold him a quantity of narcotics. There also was evidence that a second sale by Robert Lewis alone occurred at a later date. Both defendants testified in their own behalf and denied making the alleged sales (11a-14a). They further testified that they had no independent recollection of what had transpired on the date and time when the sales allegedly took place (11a, 14a). Subsequent to a formal request that the informer be produced (8a-9a), which was denied by the court, the Government produced a name and address allegedly that of the informer. Further investigation showed that no such name and address existed. It is respectfully submitted that the failure of the Government to produce the informer was so prejudicial to the defendants, that it prevented them from receiving a fair trial.

The United States Supreme Court in the case of *Brady* v. *The State of Maryland,* 373 U. S. 83, held that any evidence which bears upon the guilt or innocence of the defendant or with respect to punishment must be disclosed by the prosecutor. It is a violation of the due process clause of the United States Constitution not to disclose such evidence.

In *Roviaro* v. *United States, supra,* the court felt that it was essential to a fair presentation of the defendant's case that the Government informer be available to testify, especially where he was the sole participant together with the accused in the transactions charged, and the informer was the only witness in a position to amplify or contradict the testimony of the Government's witness. The informer had helped to set up a criminal occurrence and had played

the prominent part in it. His testimony might have disclosed an entrapment. He might have cast doubt upon the defendant's identity or on the identity of the package that was allegedly sold to the agent. The desirability of calling the informant as a witness was at least vital in preparation for trial and was a matter for the accused rather than the Government to decide.

3. The Court of Appeals has decided a question of Federal law which should be settled by this Court.

The court committed error in its charge (15a-17a) when it said that the delay by the Government's police officers in arresting the defendants was not to be considered by the jury. It is respectfully submitted that the jury has a right to consider the time that has elapsed between the alleged commission of the crime and the time of the arrest, especially where the sole issue before the jury is that of identification. It is certainly proper for the jury to consider whether the officer's memory was not blurred by the inordinate lapse of time, namely the 15 months between the time of the commission of the crime and the time of the arrest.

The court also committed error when it denied the defendants' access to the question and answer statements that were taken by the Assistant U. S. Attorney subsequent to the defendants' arrest (9a-11a). On the authority of *Brady* v. *Maryland, supra,* the defendants are entitled to any statements of any nature whatsoever, that may in any way exculpate them or in any way bear upon their guilt or innocence. It was a serious error to deny access to such statements.

Conclusion

Since the defendants were deprived of a fair trial, in violation of due process of law, in that there was an inordinate delay between the time of the alleged commission of the crime and the time of the arrest, and since the Government should have properly produced the Government informer, who was a major participant in the crimes charged against the defendants, and since the court committed serious error in its charge to the jury and in denying the defendants access to statements made by them, this Court must grant petitioners' petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

THOMAS J. MAZZA
Attorney for Defendants-Petitioners
60 East 42nd Street
New York, New York 10017

Appendix A

Original Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 390—September Term, 1965.

(Argued May 11, 1966 Decided May 11, 1966.)

Docket No. 29840

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT HAMMOND and ROBERT LEWIS,

Appellants.

Before:

LUMBARD, Chief Judge,
WATERMAN and KAUFMAN, Circuit Judges.

Appeal from a decision of the United States District Court for the Southern District of New York, Richard H. Levet, *J.*, and a jury, which found appellants guilty of violating the federal narcotics laws, 21 U. S. C. §§173, 174.

Affirmed.

DAVID A. LUTTINGER, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, and Hugh C. Humphreys, Assistant United States Attorney, New York, N. Y., on the brief), *for appellee.*

THOMAS J. MAZZA; New York, N. Y., *for appellants.*

PER CURIAM:

We affirm in open court the convictions for violation of the narcotics laws, 21 U. S. C. §§173, 174, entered after a jury trial on May 21, 1965. Appellants argue that the fifteen-month delay between the offense and their arrest violated due process because it was an unnecessary delay which prejudiced their ability to recollect the events in question. Although appellants raised this question at trial the government was prevented from offering any explanation of the delay by defense counsel's successful objection to such explanatory testimony. We adhere to our decision in *United States* v. *Wilson,* 342 F. 2d 782, cert. denied, 382 U. S. 860 (1965), that such a delay, in the absence of any other circumstances, does not violate any right of the accused. *Ross* v. *United States,* 349 F. 2d 210 (D. C. Cir. 1965), cited by appellants and decided subsequent to our decisions, does not persuade us to the contrary.

Appendix B

Judgment of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of May, one thousand nine hundred and sixty-six.

Present:

Hon. J. EDWARD LUMBARD, Chief Judge,
Hon. STERRY R. WATERMAN,
Hon. IRVING R. KAUFMAN, Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT HAMMOND and ROBERT LEWIS,
Defendants-Appellants.

A motion having been made herein by counsel for the appellants to extend the time to file a petition for rehearing,

Upon consideration thereof, it is

Ordered that the time to file the petition for rehearing be and it hereby is extended to and including June 10, 1966.

/s/ A. DANIEL FUSARO
Clerk

Appendix C

Order of United States Court of Appeals for the Second Circuit Extending Time to File Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 29840

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT HAMMOND and ROBERT LEWIS,

Appellants.

APPLICATION TO EXTEND TIME TO FILE PETITION FOR REHEARING

Time within which to file petition for rehearing extended until June 10, 1966.

JEL per IRK
SRW per IRK
IRK

USC JJ

Dated: New York, N. Y.
May 25, 1966

Appendix D

Order of United States Court of Appeals for the Second Circuit Denying Petition for Rehearing and Staying Mandate

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT HAMMOND and ROBERT LEWIS,

Defendants-Appellants.

PETITION FOR REHEARING AND MOTION IN THE ALTERNATIVE FOR A STAY OF THE MANDATE

THOMAS J. MAZZA, New York, N. Y.,
for defendants-appellants.

Petition for rehearing denied.

The mandate is stayed subject to the provisions of our Rule 28(c).

J. E. L.
S. R. W.
I. R. K.
U. S. C. JJ.

June 27, 1966

Appendix E

Opinion of United States Court of Appeals for the Second Circuit Denying Petition for Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT HAMMOND and ROBERT LEWIS,

Defendants-Appellants.

PETITION FOR REHEARING IN BANC

THOMAS J. MAZZA, New York, N. Y.,
for defendants-appellants.

All the active circuit judges having voted to deny rehearing the case in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

27 June 1966

Appendix F

Opinion of United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 390—September Term, 1965.

(Petition for Rehearing

Submitted: June 8, 1966 Decided: June 27, 1966.)

Docket No. 29840

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT HAMMOND and ROBERT LEWIS,

Defendants-Appellants.

Before:

LUMBARD, Chief Judge,
WATERMAN and KAUFMAN, Circuit Judges.

Petition for rehearing of decision affirming convictions for violations of the federal narcotics law, 21 U. S. C. §§173, 174. Denied.

THOMAS J. MAZZA, New York, N. Y.,
for defendants-appellants.

Appendix F

PER CURIAM:

The petition for a rehearing on the ground that the appellants were unfairly prejudiced by the court deciding the case in open court without oral argument by their counsel, who was absent, is denied. There is no merit to such a contention.

Defendants were convicted of selling heroin after a jury trial before Judge Levet on April 23, 1965. They were sentenced to five-year terms in prison, on May 21, 1965, and their release was continued on $7,500 bail, each, pending appeal. After six extensions of time, the appellants filed their brief and appendix with this court on March 31, 1966. Their attorney was notified on April 25, 1966 that the case was scheduled to be argued on Wednesday, May 11. When the calendar was called that morning the court was informed that he was in Europe and that the person appearing was not prepared to argue. No explanation was given then, and none is given now, why counsel could not have informed the court earlier or why substitute counsel was not sought, nor has any reason been suggested why a trip to Europe, undertaken after the appeal date had been set, should excuse the failure of counsel to appear.

By May 11 the court had, according to its usual custom, already read the short briefs and appendix of the appellants and of the appellee. Whenever the counsel for a party neglects to apear, or fails to present a good excuse for adjournment, the court proceeds with the appeal and

permits the opposing attorney to present his argument.[1] In this case, the Assistant United States Attorney spoke for about ten minutes and responded to questions from the bench.

At the conclusion of the argument, the court affirmed the convictions from the bench. This in no way reflected upon the failure of counsel to be present; it was in accord with a regular practice to dispose of cases from the bench when no further consideration is necessary. During this term, up to and including June 17, 1966, this court has decided 57 cases from the bench at the end of the argument, including 19 appeals in criminal or habeas corpus cases. In some of the cases, as in this one, a brief opinion was later filed to show the basis of the disposition.

Defendants' appeal was adequately presented in their briefs. On their main issue, the delay from the offense to arrest, there was clear and controlling precedent in this circuit.

On all the facts before us it would seem that counsel's motion for rehearing, somewhat belatedly filed on June 8, 1966, is only a further attempt to prolong the time before the defendants must surrender to serve their sentences, already delayed by over a year.

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1. See Uniform Rules of Federal Appellate Procedure (Proposed Draft, March 1964), Rule 34(e): "If counsel for a party fails to appear to present argument, the court may hear argument on behalf of a party whose counsel is present, and the case will be decided on the briefs and the argument heard."